

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Estate OF Alice J. Raymond, Deceased

CLAIR MORSE,

Petitioner - Appellee,

v.

VALIERIE SHARKEY, GAIL THOMAS, GARY
ZEIGLER, DEANNA CONANT, CARYN
NUXHET, JAY CURRY, MARY JEAN
MANDELA, JOHN PACKARD, FRANK
PACKARD, LISA MORSE, ELLIOT
GUILLARY, ROBERT MCCLELLAND,
BEVERLY CLEMENT, DAVID MORSE,
JUDITH FROELICK, PHILLIP MORSE, JOAN
SUMMERS, JANICE FELKEY, DONALD
MORSE, MARVIN STULL, ERIC STULL,
FRANK BRIGGS, JOANNE CARTER and
MARILYN RIGEL,

Respondents - Appellants.

Court of Appeals No.: 267364
Lenawee County Probate Court
LC No.: 05-44839

134461

RESPONSE TO APPLICATION
FOR LEAVE TO APPEAL

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FILED

AUG 10 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

RESPONSE TO APPLICATION
FOR LEAVE TO APPEAL

NOW COMES Petitioner - Appellee Clair Morse, pursuant to MCR

7.302(D) (E) and MCR 7.312(G) and respond to the Application for Leave to Appeal as follows:

1. That this matter was heard in the Probate Court for the County of Lenawee and the presiding Judge in that matter correctly ruled from the bench that the Respondents - Appellants were not beneficiaries of the Estate of Alice J. Raymond under the will.
2. That the Respondents - Appellants appealed as of right to the Michigan Court of Appeals and the Court of Appeals entered its published opinion of June 7, 2007 affirming the lower Court, with a dissenting opinion.
3. That the subject matter of the appeal involves the construction of a will which contains language in a certain grammatical context, the meaning of which has previously been ruled upon by the Michigan Court of Appeals and the Michigan Supreme Court.
4. That the Michigan Court of Appeals decision is not erroneous and is consistent with the Supreme Courts prior ruling with regard to class gifts using per capita distribution which is applicable in this situation.
5. That the matter does not present an issue of first impression or interest as the Supreme Court has previously addressed this issue on a like matter.
6. That the factual and procedural posture of the case make it an inappropriate vehicle for addressing this issue.

WHEREFORE, Petitioner - Appellee prays that this Honorable Court not grant the Respondents - Appellants leave to file an appeal in the within cause from the decision of the Court of Appeals rendered on June 7, 2007.

By 
Anna Marie Anzalone (P 63267)

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BRIEF

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STATEMENT OF QUESTIONS

1. DOES CONSTRUCTION OF ALICE J. RAYMOND'S WILL LEAD TO A FINDING THAT DESCENDANTS OF DECEASED BROTHERS AND SISTERS OF ALICE J. RAYMOND AND HER DECEASED HUSBAND CLAUDE C. RAYMOND SHOULD RECEIVE THEIR DECEASED PARENT'S SHARE PER STIRPES?

The Probate Court Answered NO.

The majority opinion in the Court of Appeals answers NO.

The Petitioner-Appellee answered NO.

The Respondents-Appellants answered YES.

The dissenting opinion in the Court of Appeals answers YES.

STATEMENT OF FACTS

Alice J. Raymond's will dated January 15, 1979 states in paragraph "Second" that if Claude C. Raymond predeceases Alice J. Raymond, the residue of her estate "...shall be divided in the following manner:

- A. Fifty (50%) percent thereof to my brother and sisters that survive me share and share alike or to the survivor or survivors thereof.
- B. Fifty (50%) percent thereof to the brother and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

Claude C. Raymond predeceased Alice J. Raymond and they did not have any children. Two of Alice's brothers and two brothers and one sister of Claude were alive at the time of Alice J. Raymond's death. Several brothers and sisters of both Claude and Alice J. Raymond predeceased Alice J. Raymond. The descendants of these brothers and sisters who predeceased Alice J. Raymond are the Respondents-Appellants.

The question posed by the Respondents-Appellants is whether Alice J. Raymond's will is ambiguous therefore requiring construction which would lead to a finding that the descendants of the brothers and sisters who predeceased Alice J. Raymond would take their deceased parents share. This question arises from the language "or to the survivor or survivors thereof" in the residuary clause. The Probate Judge determined that the language was not confusing. The interpretation of the will was solely determined by what was within the four corners of the instrument. No testimony was taken in the Probate Court. The Court of Appeals, in a published opinion, affirmed the Probate Court's Order stating that the Probate Court correctly construed the testator's will to mean that the testator's surviving siblings were to inherit fifty percent and the surviving siblings of her predeceased spouse were to inherit fifty percent. The Court of Appeals relied in part upon the precedent established by the Supreme Court regarding *In re Holtforth's Estate*, 298 Mich 708; 299 N.W. 776 (1941).

ARGUMENT

1. DOES CONSTRUCTION OF ALICE J. RAYMOND'S WILL LEAD TO A FINDING THAT DESCENDANTS OF DECEASED BROTHERS AND SISTERS OF ALICE J. RAYMOND AND HER DECEASED HUSBAND CLAUDE C. RAYMOND SHOULD RECEIVE THEIR DECEASED PARENT'S SHARE PER STIRPES?

The Probate Court Judge stated that the clause of the will in question did not appear to be confusing or ambiguous. "The role of the probate court is to ascertain and give effect to the intent of the testator as derived from the language of the will. Where there is no ambiguity, the court has merely to interpret and enforce the language employed. Findings of the probate court sitting without a jury will be reversed only when clearly erroneous." In re Norwood Estate, 178 Mich. App. 345, Mich. Ct. App., (April 19, 1989), Decided.

The issue is two clauses that are identical in the residual clause. One clause refers to the heirs of Alice J. Raymond and the other one deals with the heirs of her husband. Alice J. Raymond's will dated January 15, 1979 states in paragraph "Second" that if Claude C. Raymond predeceases Alice J. Raymond, the residue of her estate "....shall be divided in the following manner:

- A. Fifty (50%) percent thereof to my brother and sisters that survive me share and share alike or to the survivor or survivors thereof.
- B. Fifty (50%) percent thereof to the brother and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

The Probate Court Judge opined that the first part of the disputed clause clearly determined the qualified group which was the brothers and sisters of Alice J. Raymond and

Claude C. Raymond. The clause was then clarified by the addition of the term “that survive me” meaning the surviving brothers and sisters of Alice J. Raymond and Claude C. Raymond at the time of the decedent’s death. The Probate Court Judge then determined that the remaining clause would be descriptive of the earlier group, that being those brothers and sisters that survive me. The remainder of the clause states “to share and share alike or to the survivors thereof” is interpreted as to “those brothers and sisters who are left, to share and share alike and descriptive of the benefit to be received.” The court determined that this interpretation applied to clause A and B. Descendants of those brothers and sisters who predeceased the decedent do not take the share of their deceased parent.

“The primary duty of any court faced with the task of resolving a disputed testamentary disposition is to effectuate as nearly as possible the intention of the testator. Where there is no ambiguity, that intention is to be gleaned from the four corners of the instrument, *In re Scheyer’s Estate*, 336 Mich 645, 648-649; 59 NW 2d 33 (1953); *Wheeler v. Wood*, 104 Mich 414; 62 NW 577 (1895), and the court has merely to interpret and enforce the language employed.” This petitioner-appellee stated that the language used in the will of Alice J. Raymond created no ambiguity and the interpretation of the language used clearly supports petitioners argument that any surviving descendants of the predeceased brothers and sisters of Alice J. Raymond or surviving descendants of the predeceased brothers and sisters of Claude C. Raymond would not receive any share of the residue.

The Michigan Rules of Construction that apply to the provisions in question include the following sections of the Michigan Estates and Protected Individuals Code: 700.2601, 700.2602 and 700.2603 with emphasis on 700.2603(1)(C)(D) which states as follows:

Sec. 2603. (1) If a devisee fails to survive the testator and is a grandparent, a grandparent's descendant, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(c) For the purposes of section 2602(1), words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children", are not in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(d) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by subdivision (a) or (b), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

The respondents tried to argue that EPIC changes the anti-lapse statute, but in the Reporter's Supplemental Commentary - 2005 for 700.2603, the Reporter's Comments clearly support the case law we have provided in support of our brief. The comments state that "the anti-lapse statute did not apply to preserve the gift for issue of one of the seven children who predeceased the testator" in In re Holtforth's Estate, 298 Mich 708; 299 N.W. 776 (1941). Respondents-Appellants incorrectly state that In re Holtforth's Estate is clearly not on point. It is evident that this case does apply to the will of Alice J. Raymond. The Court of Appeals held that the language used in the residuary clause of Alice J. Raymond's taken as a whole express an intent to make a provision for the death of the beneficiaries contrary to that provided for in the antilapse statute.

The Respondents-Appellants incorrectly stated that there is no case on point in Michigan and deny that the Michigan Court of Appeals addressed the very same issue we are addressing here in In the Matter of the Estate of Audrey Burruss, Deceased, 152 Mich. App. 660, *; 394 N.W. 2d 466 (1986). The will of Audrey Burruss stated that "if her husband predeceased her that the residue and remainder of the estate, in equal amounts, went to her daughters or to the survivor or survivors of them." Audrey Burruss had three daughters. One daughter predeceased her and the children of that daughter were determined by the court to have no share in the residue of the decedent's estate. The

court held that the testatrix's intent was ascertainable both from the clear language used in the will and from the very presence of such language in the will, read in conjunction with Michigan's anti-lapse statute.

"The sole issue considered by the probate court was whether the language "share and share alike, to my daughters...or to the survivor or survivors of them", created an ambiguity within the four corners of the will, thereby requiring will construction. The court found that the will was clear and unambiguous and that it need not go outside the will to interpret it. The court held that the language expressed an intent to make a provision for the death of the beneficiaries contrary to that provided for in Michigan's anti-lapse statute."

The will of Alice J. Raymond in section "Second" states that:

- A. Fifty (50%) percent thereof to my brother and sisters that survive me, share and share alike or to the survivor or survivors thereof.
- B. Fifty (50%) percent thereof to the brother and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

The language used in the will of Alice J. Raymond is almost or nearly identical to the language used in the will of Audrey Burruss, *In The Matter of The Estate of Audrey Burruss, deceased*. The only difference is that the will of Audrey Burruss used the phrase "of them" while the will of Alice J. Raymond uses the word "thereof". Thereof is defined as " (1) Of or concerning this, that or it; (2) from or because of a stated cause or origin; therefrom." *The American Heritage Dictionary of the English Language*, Houghton Mifflin Company, (1981). Therefrom is further defined as "From that, this or it; coming from that time, location, or thing." It is very clear that the term "thereof" is of the same meaning as "from them". Thereof is simply referring to the aforementioned siblings who survive Alice J. Raymond and were designated as beneficiaries and that the decision reached in *In The Matter of The Estate of Audrey Burruss*, clearly supports petitioner's argument that thereof refers to only the surviving siblings of Alice J. Raymond and the surviving brothers and sisters of the husband of Alice J. Raymond, being Claude C. Raymond.

Following the Burruss rationale, if Alice J. Raymond had wanted her nieces or

nephews to inherit a deceased parent's share, the language of the will would have stated "their children", "their issue" or "their heirs. The words "that survive me" and "survivor or survivors thereof" clearly denote that her intent was for the surviving siblings to inherit. The use of survivorship language clearly suggests a contrary intention by the will and overcomes the anti-lapse statute as added evidence under Michigan Estates and Protected Individuals Code 700.2603(1) (c).

The Supreme Court of Michigan clearly held in In re Holtforth's Estate, 298 Mich 708; 299 N.W. 776 (1941), that the term "and the survivor of them" intended and provided for that in the event one or more of the children of John Holtforth predeceased the testator, the portion of the estate that passed under the second paragraph of the will should go to the survivors of the John Holtforth children" and not the descendants of the predeceased children of John Holtforth. Alice J. Raymond's will uses the language "or to the survivor or survivors thereof" which clearly mirrors the language of the Holtforth will which used the language "and the survivor of them". By the use of the language "or to the survivor or survivors thereof" in the will of Alice J. Raymond, we have clear additional evidence to support the argument that the anti-lapse statute should not apply and therefore the descendants of the siblings that predeceased Alice J. Raymond should not take their parents' share per stirpes.

The Court of Appeals used In re Holtforth's Estate, 298 Mich 708; 299 N.W. 776 (1941) as precedent when making a determination in the case In the Matter of the Estate of Audrey Burruss, Deceased, 152 Mich. App. 660, *; 394 N.W. 2d 466 (1986). The Court of Appeals opinion stated that the aforementioned cases are significant legal precedents that provided a specific legal meaning to the word "survivor" as used in this context. The Court of Appeals stated in their opinion that *Burruss* and *Holtforth* made it clear that the

term “survivor” is not to indicate descendent but in a legal context is defined as ‘one who outlives another. “

In Tonnelier v. Westin, 302 Mich. 213 (1942), the trial judge held that the first sentence of the item in which the residue was left to the brothers and sisters surviving at the death of the wife absolutely, effectively excluded the contestants” who were the descendants of the deceased siblings who predeceased the decedent. On appeal, the court affirmed. The pertinent clause in the will stated that upon the death of his wife the residue, both real and personal, is to go to his brothers and sisters surviving at the death of his said wife, to be divided equally between them, share and share alike. The brothers and sisters who survived the decedent would then take the residue but any who had predeceased the decedent would not.

Respondents-Appellant’s arguments clearly does not apply to the will at issue. The two pertinent clauses in this will clearly state that the residue of her estate is to pass to the brothers and sisters that survived her. As stated by the Probate Judge, the clause may indeed contain unnecessary wording, but the result is the same. There is no ambiguity in the language used and the will does not require construction by this honorable court. The Michigan case law cited clearly supports this conclusion even though Respondents-Appellants incorrectly applied the cases to their own argument.

RELIEF

Petitioner-Appellee pray that this Court affirm the decision of the Lenawee County Probate Court and that the surviving brothers and sisters of Alice J. Raymond and the surviving brothers and sisters of her deceased husband should inherit only and that no share should be allotted to any surviving descendants of any predeceased siblings of either Alice J. Raymond or her deceased husband.

Dated: August 9, 2007

A handwritten signature in cursive script, reading "Anna Marie Anzalone".

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